Leong Bon Huat v Public Prosecutor

SUPREME COURT (KUCHING) — CRIMINAL APPEAL NO 05–47–92
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
2 AUGUST 1993

Criminal Procedure *— Trafficking in dangerous drugs — Evidence of chemist — Tests conducted on inadequate quantities of dried leaves — No proof that bulk of dried leaves examined by government chemist was cannabis within the meaning of s 2 of the Dangerous Drugs Act 1952 — Dangerous Drugs Act 1952 ss 2, 39A & B*

The appellant had been convicted in the High Court for trafficking in a dangerous drug, to wit, cannabis, weighing 793.85g. When the appellant was arrested, he was carrying a black bag from which was recovered a bulk of dried leaves believed to be cannabis wrapped in a Chinese newspaper. The dried leaves were sent to the government chemist for examination and analysis and he concluded that it was cannabis within the meaning of s 2 of the Dangerous Drugs Act 1952 ('the Act'), in weight 793.85g. In his testimony, it appeared that while the total weight of the plant material said to be cannabis was 793.85g, the total weight of the samples taken for analysis was 'more than 10% of the net weight of 793.85g' of plant material. The chemist did not take any sample from the balance of the plant material, which formed a very substantial part of the whole, for analysis. The main ground of appeal was that the testimony of the chemist did not prove beyond any reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s 2 of the Act.

Held, allowing the appeal:

(1) If by the expression 'more than 10% of the net weight of 793.85g' is meant a little more than 10%, then the testimony of the chemist at best established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis which is required for the operation of the presumption of trafficking under s 37(da) of the Act.

(2) While the physical examination of the whole of the plant material by the chemist might on the balance of probabilities establish that the plant material was cannabis within the meaning of s 2 of the Act, it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material. In the present case, the samples of the plant material upon which the chemist had carried out the chemical tests were inadequate, having regard to the total weight of the plant material.

(3) So far as the charge of trafficking in cannabis in contravention of s 39B of the Act was concerned, the case against the appellant was not proved with that certainty which is necessary in order to justify the verdict of guilty.

(4) The conviction of trafficking in cannabis should be set aside and substituted by a conviction for possession of cannabis in contravention of s 39A of the Act.

[Bahasa Malaysia summary

Perayu telah disabitkan di Mahkamah Tinggi untuk kesalahan mengedar dadah berbahaya, iaitu kanabis, seberat 793.85g. Apabila perayu ditangkap beliau sedang membawa sebuah beg hitam dari mana dijumpai daun-daun kering, yang dipercayai adalah kanabis, dibungkus di dalam suratkhabar Cina. Daun-daun kering itu telah dihantar kepada ahli kimia kerajaan untuk pemeriksaan dan analisa dan beliau telah memutuskan bahawa daun-daun kering tersebut adalah kanabis mengikut makna s 2 Akta Dadah Berbahaya 1952 ('Akta itu'), dan beratnya 793.85g. Di dalam keterangan beliau, ternyata bahawa sungguhpun jumlah berat bahan tumbuhan yang dikatakan kanabis itu adalah 793.85g, jumlah berat sampel yang diambil untuk analisa adalah 'more than 10% of the net weight of 793.85g' bahan tumbuhan itu. Ahli kimia itu tidak mengambil sebarang sampel dari baki bahan tumbuhan itu, yang merupakan sebahagian besar daripada keseluruhannya, untuk dianalisa. Alasan utama rayuan adalah bahawa keterangan ahli kimia itu tidak membuktikan hingga tidak ada keraguan yang munasabah bahawa sebahagian besar daripada daun-daun itu adalah kanabis menurut makna s 2 Akta itu.

Diputuskan, membenarkan rayuan itu:

(1) Jika dengan penyataan 'more than 10% of the net weight of 793.85g' dimaksudkan sedikit lebih daripada 10%, keterangan ahli kimia itu paling baik hanya menunjukkan bahawa perayu memiliki sedikit lebih daripada 79.30g kanabis, yang jauh kurang daripada minima 200g yang ditetapkan oleh undang-undang untuk menimbulkan anggapan mengedar di bawah s 37(da) Akta itu.

(2) Walaupun pemeriksaan fizikal keseluruhan bahan tumbuhan tersebut oleh ahli kimia itu boleh, pada imbangan kebarangkalian, menunjukkan bahawa bahan tumbuhan itu adalah kanabis mengikut makna s 2 Akta itu, langkah selanjutnya perlu diambil untuk menunjukkan hingga tidak ada keraguan yang munasabah bahawa bahan itu adalah kanabis seperti yang ditakrifkan. Langkah yang selanjutnya itu memerlukan supaya pemeriksaan kimia dijalankan ke atas kuantiti bahan tumbuhan yang mencukupi. Di dalam kes ini, sampel yang diambil oleh ahli kimia itu untuk menjalankan pemeriksaan kimia tidak mencukupi, memandangkan jumlah berat bahan tumbuhan itu.

A (3) Setakat tuduhan mengedar kanabis di bawah s 39B Akta itu, kes terhadap perayu tidak dibuktikan dengan keyakinan yang diperlukan untuk menjustifikasikan keputusan bersalah.
(4) Sabitan mengedar kanabis itu hendaklah diketepikan dan diganti dengan sabitan memiliki kanabis di bawah s 39A Akta itu.]

B **Cases referred to**
1 *PP v Ang Soon Huat* [1991] 1 MLJ 1 (folld)
2 *R v Wallace* 23 Cr App Rep 32 (folld)
3 *Jubri v PP* [1962] MLJ 34 (folld)

C **Appeal from**: Criminal Trial No LG 2 of 1988 (High Court, Kuching)

Bong Ah Loi (*Jaini Mardi & Associates*) for the appellant.
Mohd Zaki bin Mohd Yasin (Deputy Public Prosecutor) for the public prosecutor.

D **Edgar Joseph Jr SCJ** (delivering the grounds of judgment of the court): The appellant was convicted in the High Court at Kuching for trafficking in a dangerous drug, to wit, cannabis weighing 793.85g, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952, ('the Act') and sentenced to death. It was alleged that the offence was committed on the afternoon of E 10 May 1988 in front of a coffee shop called Chop Poh Hin, No 40, Jalan Wong Tsap En, Limbang, in the state of Sarawak.

We do not propose to discuss the facts at any great length because it was proved up to the hilt, and indeed freely admitted by the appellant, that at the time of his arrest he was standing outside the coffee shop, with a black F bag slung over his shoulder from which there was recovered — amongst other personal items — a bulk of dried leaves believed to be cannabis wrapped in Chinese newspaper and his Malaysian passport.

The dried leaves were promptly sent to the government chemist Mr Tan Ching Chee (PW5) for examination and analysis and he concluded that it was cannabis within the meaning of s 2 of the Act, in weight 793.85g.

G The only defence put forward at the trial before Dennis Ong Jiew Fook J (sitting alone) was that the cannabis was planted in the bag. That defence was, however, rejected by the trial judge who, in the event, convicted the appellant and sentenced him to death.

Before us, the conviction was attacked on two grounds, namely:

H (a) that the way in which the trial judge dealt with the defence was unsatisfactory and;
(b) alternatively, that the testimony of the chemist did not prove beyond any reasonable doubt that the bulk of dried leaves was cannabis within the meaning of s 2 of the Act.

I It is sufficient if we say that so far as the first of these grounds is concerned, no exception could be taken to the careful and thorough manner in which the trial judge dealt with it.

The appellant was, however, on firmer ground so far as his second ground was concerned. A

Now, the chemist had, as we have said, testified that he had examined and analysed the bulk of dried leaves and found it to be 793.85g of cannabis.

Explaining how he arrived at this conclusion he said this: B

> I conducted a visual examination of the contents of 'E1' and then I took samples of the content of dried plant matter. I examined the samples using chemical methods and also conducted microscopic examination. I took samples from various positions of each layer of the dried plant matter and I examined and analysed such samples individually.

C

It will be seen that he made no mention of the results of his physical examination; for example, he did not say that the plant material was all of the same type and physical features as that of cannabis, nor did he say what were the results of his microscopic examination. Did he notice any resin in the plant material? If so, in what quantity was it present? Nor did he tell the court as to what were the tests he conducted using chemical methods; for D example, did he resort to the Dequenois Levine test and/or the thin layer chromatography test? If so, what were the results of those tests?

But, more importantly, under re-examination by the deputy public prosecutor the chemist said this:

> I did not obtain the weight of each sample taken but the total weight of samples taken for analysis was more than 10% of the net weight of 793.85g. E

And, it was only in answer to the court, at the end of his re-examination that he said:

> The dried plant matter is cannabis as defined in s 2 of the DDA 1952. I examined it in accordance with the definition in the DDA 1952. F

But, the crucial point was whether the grounds upon which he arrived at the conclusion that the plant material was cannabis as defined in s 2 of the Act could withstand the test of strict curial scrutiny.

It is obvious that from the extracts of the testimony of the chemist, the following plain facts emerge: G

First, the total weight of the plant material said to be cannabis was 793.85g.

Second, the total weight of the samples taken for analysis was 'more than 10% of the net weight of 793.85g' of plant material.

Third, the chemist did not take any sample from the balance of the plant material (which formed a very substantial part of the whole) for analysis. H

Now, what does 'more than 10% of the net weight of 793.85g' mean? Does it mean 11% or 12% or 13% or more than that? Not to put too fine a point on it, the expression 'more than 10%' is ambiguous and there should be no ambiguity on such a matter where the life of a subject is at stake. What is necessary is that the testimony of the chemist upon such a I matter must be clear and convincing.

To take the point a little further, if by the expression 'more than 10% of the net weight of 793.85g' means a little more than 10% — and we think,

in ordinary parlance, it would not be incorrect to say that it bears such a meaning — then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s 37(da) of the Act.

It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated.

We note that in the Singapore case of *PP v Ang Soon Huat,*[1] where one of the contentions advanced by counsel for the accused was similar to that advanced in the present appeal, and where the contention was upheld, the court having reminded itself of the criminal standard of proof, had concluded that where the court was left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death.

The result, therefore, was that so far as the charge of trafficking in cannabis in contravention of s 39B was concerned, 'the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty'. (Per Lord Hewart CJ in *R v Wallace*[2] applied by Thomson CJ in *Jubri v PP.*[3])

Accordingly, we have no option but to allow the appeal, to quash the conviction for trafficking in cannabis, to set aside the sentence, and to substitute in lieu thereof, a conviction for possession of cannabis in contravention of s 39A of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the rotan.

Appeal allowed.

Reported by Prof Ahmad Ibrahim